



**Title:** *Good or Bad: Amended Federal Rules of Civil Procedure's Impact on Intellectual Property Litigation*

**Date:** March 17, 2016

**Time:** *3:45 PM to 5:00 PM*

**Moderator**

Clara N. Jimenez  
Associate,  
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP  
Washington, DC

**Panelists**

Efren Garcia  
General Counsel  
ARC, Inc.  
Austin, TX

Jennifer Burdman  
Partner  
King & Spalding LLP  
Washington, DC

## Tab 1 – Biographies or CVs

## EFREN GARCIA

Efren.Garcia@gmail.com  
(512) 820-5701

4005 Rosedale Ave.  
Austin, TX 78756

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### EXPERIENCE

**Summary:** My principal areas of practice are intellectual property litigation and commercial and technology transactions. My litigation experience includes representing companies involved in disputes concerning e-commerce, wireless broadband technology, flash memory design, optical-character-recognition software, telecommunications technology, and push technology. Further, my litigation experience extends to both district courts and the International Trade Commission and includes taking and defending 30(b)(6) depositions, drafting Markman briefs and technical expert reports, drafting and arguing various dispositive and non-dispositive motions, drafting non-infringement and invalidity contentions, and various aspects of trial preparation. My transactional experience includes drafting and negotiating commercial and intellectual property contracts, such as license, development, supply, software, manufacturing, cloud computing, and service agreements.

<b>ARC, Inc.</b> , Austin, TX	<i>General Counsel</i> , Jun. 2015 – Present
<b>Kastner Huggins Reddien &amp; Gravelle LLP</b> , Austin, TX	<i>Sr. Associate</i> , Mar. 2015 – Jun. 2015
<b>Vinson &amp; Elkins LLP</b> , Austin, TX	<i>Sr. Associate</i> , Nov. 2012 – Feb. 2015
<b>Garcia &amp; Hornberger LLP</b> , Austin TX	<i>Partner</i> , July 2011 – Oct. 2012
<b>Vinson &amp; Elkins LLP</b> , Austin, TX	<i>Associate</i> , Aug. 2008 – June 2011
<b>Wilson Sonsini Goodrich and Rosati, PC</b> , Austin, TX	<i>Associate</i> , Oct. 2006 – July 2008
<b>Wilson Sonsini Goodrich and Rosati, PC</b> , Austin, TX	<i>Summer Associate</i> , Summer 2005
<b>Baker Botts LLP</b> , Houston, TX	<i>Summer Associate</i> , Summer 2005

### HONORS & ADMISSIONS

Recognized by *Super Lawyers* as a “Texas Rising Star,” 2013, 2014, & 2015; Recipient of the 2015 Honorable Lee Yeakel Intellectual Property American Inn of Court Pro Bono Award; Member of the Austin Volunteer Legal Services Sustainability Society (2013-2015); Admitted to the State Bar of Texas and the United States Patent and Trademark Office

### EDUCATION

**Columbia Law School**, New York, NY  
J.D. 2006; *Harlan Fiske Stone Scholar*; Columbia Human Rights Law Review – Staff Editor; Extern to the Honorable Chester J. Straub, United States Court of Appeals for the Second Circuit, Fall 2005

**Rice University**, Houston, TX  
B.S., Mechanical Engineering, 1999; Fulbright Scholarship (Declined); President’s List

### PUBLICATIONS AND PRESENTATIONS

- “Introduction to Intellectual Property,” Lecture, Rice University, Houston, Texas, March 10, 2012
- “Attack of the False Marking Trolls,” Intellectual Property Litigation, Vinson & Elkins, March 4, 2010 (co-author)
- “The Effect of *TS-Tech* on Patent Cases in the Eastern District of Texas,” Presentation & CLE, Texas Intellectual Property Law Journal Symposium, University of Texas, Austin, Texas, February 19, 2010

### OTHER

- Fluent in Spanish; Brazilian jiu jitsu blue belt; snowboarding



## Jennifer H Burdman

PARTNER

### CONTACT

WASHINGTON, D.C.  
1700 Pennsylvania Avenue, NW  
Suite 200  
Washington, DC 20006-4707  
T: +1 202 626 2937  
F: +1 202 626 3737

[jburdman@kslaw.com](mailto:jburdman@kslaw.com)

### PROFILE

Jennifer Burdman is a partner in the firm's Washington, D.C. office, where she practices in the Intellectual Property Group. An experienced trial lawyer, she has successfully represented clients at the trial and appellate levels in complex, high-stakes litigations in patent infringement, trade secret misappropriation, and contractual matters involving IP rights, as well as before copyright tribunals in the United States. With her background firmly rooted in science, she is able to quickly translate the technology from inventors to the jury in a clear and understandable way.

Noteworthy wins include a jury verdict of patent infringement resulting in over \$34 million in damages, a jury verdict of willful misappropriation of trade secrets with damages of over \$900 million, and the successful defense of a university against a patent licensee seeking expanded rights relating to its sponsored research and license agreements. She has also successfully litigated the allocation of over \$300 million in cable copyright royalties before the Copyright Royalty Board.

When not in the courtroom, Ms. Burdman regularly counsels clients on a broad range of matters relating to the acquisition, protection, licensing, and enforcement of intellectual property rights. She invests considerable time on-site with clients, strategizing about IP-related matters and helping to implement those strategies in the business setting.

[In 2015, \*The National Law Journal\* named Ms. Burdman a "Rising Star" in Washington, D.C.](#)

Ms. Burdman graduated from Dartmouth College with an A.B. in biochemistry and molecular biology and received her J.D. from Fordham University School of Law.

### Representative Experience

- 1 *LifeNet Health v. LifeCell Corporation*: No. 2:13-cv-00486 (E.D. Va.): Represented LifeNet Health in patent infringement action involving the preservation of soft tissue grafts, securing jury verdict of infringement and over \$34 million in damages. The verdict was featured by [Law360](#) in an article on November 18, 2014 and was featured in Law360's [Weekly Verdict Legal Lions](#) on November 20, 2014.
- 1 *Medivation v. The Regents of the University of California, et al.*, No. CGC-11-510715 (Cal. Superior Court, San Francisco): Represented The Regents of the University of California and professor Dr. Michael Jung in a sponsored research and licensing dispute against Medivation relating to chemical compounds for the treatment of prostate cancer. Defeated all contract claims asserted by Medivation against The Regents and prevailed in court trial on behalf of The Regents, entitling it to \$32 million in possible future payments pursuant to patent license. In jury trial successfully defended Dr. Jung against fraud claims for hundreds of millions of dollars regarding rights to patented compounds.
- 1 *E.I. du Pont de Nemours and Company v. Kolon Industries, Inc., et al.*, No. 3:09-cv-58 (E.D. Va.): Represented plaintiff DuPont in case alleging misappropriation of over 100 trade secrets relating to KEVLAR® fiber technology in one of the largest trade secret misappropriation cases in the United States. Obtained a \$919 million verdict

### PRACTICES

Intellectual Property  
FDA & Life Sciences  
Intellectual Property Arbitration  
Sports, Media & Entertainment  
Trade Secrets & Non-Compete  
Copyright  
Patents  
ANDA Hatch-Waxman Litigation  
Pharma/Biotech/Med Devices  
E-Discovery  
Licensing  
Women in IP

### MEMBERSHIPS

American Intellectual Property Law Association (AIPLA)  
New York Intellectual Property Law Association (NYIPLA)  
American Bar Association (ABA)  
Hispanic National Bar Association (HNBA)  
Hispanic Bar Association of the District of Columbia (HBA-DC)  
Dartmouth Lawyers Association (DLA)  
Association of University Technology Managers (AUTM)  
Intellectual Property Owners Association (IPO)

### EDUCATION

J.D., Fordham University School of Law  
A.B., Dartmouth College

### ADMISSIONS

District of Columbia  
New York  
U.S. Court of Appeals for the D.C. Circuit  
U.S. Court of Appeals for the Federal Circuit  
U.S. Patent and Trademark Office

against Kolon for the theft of KEVLAR® technology after a seven-week jury trial held in Richmond, Virginia. This case recently received *The American Lawyer's* 2015 Legal Award (Disputes: U.S.).

- | *Distribution of the 2000 - 2003 Cable Royalty Funds* (Docket No. 2008-2 CRB CD 2000-2003). Represented the U.S. commercial television industry in hearings before the Copyright Royalty Board to determine the allocation of cable copyright royalties.
- | *Morris Reese v. AT&T, et al.*, Case No. 2:07-CV-219 (E.D. Tex.); *Morris Reese v. AT&T California*, CV-11-01934 (C.D. Cal.); *Morris Reese v. AT&T California, et al.*, 2012-1048 (Fed. Cir.). Represented defendant in multi-defendant patent litigation involving call waiting with caller ID telephony systems.
- | *Bendix Commercial Vehicle Systems, et al. v. Haldex Brake Products*, No. 1:09-CV-176 (N.D. Ohio). Represented plaintiffs in patent infringement action involving air disc brakes for commercial vehicles, securing jury verdict of willful infringement, as well as an award of attorneys' fees and permanent injunction.

## Publications & Presentations

- | "The State of Patent Law: The Interplay of Recent, Pending, and Proposed Changes," *Intellectual Property & Technology Law Journal*, Vol. 27, No. 10 (October 2015). Co-Authors: Jennifer H. Burdman and William J. Sauers
- | "Debate on Patent Reform Legislation Continues: What You Need to Know," *Bloomberg BNA Daily Report for Executives*, 155 DER B-1 (August 11, 2015). Co-Authors: J.C. Boggs, Jennifer H. Burdman, and William J. Sauers.
- | "Patent Pending: The Outlook for Patent Legislation in the 114th Congress," *Client Alert* (July 14, 2015). Co-Authors: J.C. Boggs, Jennifer Burdman, Lloyd Hand, William J. Sauers, and Jeffrey Telep.
- | "Patent Licensing Strategies and Litigation Avoidance in Light of Changing Patentability Standards," *Fourth Annual King & Spalding Patent Seminar*, Speaker, Munich, Germany, May 6, 2015.
- | "Pharma Innovation and Litigation Avoidance Strategies" – *Pharma U West*, Speaker, San Francisco, California, March 2015.

## NEWS & INSIGHTS

### NEWS

- 27 Oct 2015*      **King & Spalding Women in IP Group Takes Part in ChIPs Global Summit**
- 14 Sep 2015*      **DC's Rising Stars - Jennifer Burdman** | *National Law Journal*
- 11 Dec 2014*      **King & Spalding Snag IP Duo From Crowell & Moring** | *Law360*
- 10 Dec 2014*      **King & Spalding Expands IP Practice into Washington, D.C.**

### PUBLICATIONS

- 30 Dec 2015*      **Intellectual Property Newsletter - November/December 2015**
- 01 Oct 2015*      **The State of Patent Law: The Interplay of Recent, Pending, and Proposed Changes** | *Intellectual Property & Technology Law Journal*
- 28 Sep 2015*      **Intellectual Property Newsletter - September/October 2015**
- 12 Aug 2015*      **Debate on Patent Reform Legislation Continues in Congress: What You Need To Know** | *Bloomberg BNA Daily Report for Executives*
- 13 Jul 2015*      **Patent Pending: The Outlook for Patent Legislation in the 114th Congress**

### EVENTS

- 28 Oct 2015*      **ChIPs Women in IP Global Summit 2015, Tenth Anniversary Celebration**
- 27 Oct 2015*      **ChIPs Women in IP Global Summit 2015, Tenth Anniversary Celebration**
- 06 May 2015*      **King & Spalding Patent Seminar: A Summary of Recent Developments**



## Clara N. Jimenez Associate

Clara Jimenez focuses her practice on patent prosecution, client counseling, post-grant practice, and patent litigation in the chemical, pharmaceutical, cosmetic, and medical device industries.

**Clara N. Jimenez**  
901 New York Avenue, NW  
Washington, DC 20001-4413  
+1 202 408 4253  
Fax +1 202 408 4400  
clara.jimenez@finnegan.com

### Areas of Practice

**Patent Litigation**  
**Patent Office Trials**  
Inter Partes Review  
**Patent Office Examinations**  
Prosecution  
**Patent Portfolio Management,  
Monetization, and Transactions**  
Portfolio Management  
Opinions and Counseling

### Industry Focus

Chemical  
Pharmaceutical  
Medical Device

### Bar and Court Admissions

District of Columbia  
Massachusetts  
U.S. District Court, Massachusetts  
U.S. Court of Appeals, Federal Circuit  
U.S. Patent and Trademark Office

### Education

Boston College Law School  
J.D., 2010  
University of Massachusetts  
B.S., Chemical Engineering, *magna cum laude*, 2005

### Language

Spanish

Ms. Jimenez helps clients develop patent prosecution strategies to fit their business needs. She has experience drafting and prosecuting U.S. patent applications, and coordinating foreign patent prosecution. Ms. Jimenez also has experience preparing validity and freedom-to-operate opinions. She has assisted in post-grant proceedings in the United States and abroad, including *inter partes* reexaminations, interferences, inter partes reviews and post-grant oppositions in foreign patent offices. Ms. Jimenez also represents patentees and accused infringers in litigation before U.S. district courts and the U.S. International Trade Commission (ITC).

Her technical experience includes designing and developing chemical processes for the manufacturing of chemiluminescent reagents for clinical diagnostic assays, polyurethane resins, and aerogel insulation. Before attending law school, Ms. Jimenez worked as a process engineer in the chemical industry.

Ms. Jimenez represents disabled military veterans before the U.S. Court of Appeals for Veteran Claims in appeals related to denial of benefits. She also represents domestic abuse victims for the Family Law Project of the Women's Bar Foundation.

### **Highlights**

- Served as a law clerk for the University of Massachusetts General Counsel's office, 2009-2010.
- Handled family law and domestic violence cases as a summer intern with Greater Boston Legal Services, and as a student attorney with Boston College Legal Aid Bureau, 2008, 2010.

### **Professional Recognition**

- Sheila McGovern Scholarship, Massachusetts Association of Women Lawyers, 2009.
- Judge Helen W. Nies Scholarship, Federal Circuit Bar, 2007.

### **Professional Activities**

- American Intellectual Property Law Association
- International Association for the Protection of Intellectual Property
- American Bar Association
- Hispanic National Bar Association
- Hispanic Bar Association of the District of Columbia
- National Bar Association

Clara N. Jimenez  
Associate

901 New York Avenue, NW  
Washington, DC 20001-4413  
+1 202 408 4253  
Fax +1 202 408 4400  
clara.jimenez@finnegan.com

- American Institute of Chemical Engineers

### Select Publications

- Serves as an editor for *Full Disclosure*, Finnegan's patent prosecution newsletter; and as a regular contributor to Finnegan's AIA blog on PTAB trials and AIA provisions.
- Editor, *AIPLA Chemical Practice Chronicles* newsletter.
- Coauthor. "Amneal Pharmaceuticals, LLC v. Supernus Pharmaceuticals, Inc.: The First Successful Defense of Orange Book Listed Patents," *AIPLA Chemical Practice Chronicles Newsletter*, Jan. 26, 2016.
- Coauthor. "When Induced Infringement Under §271(f)(1) Turns into a Party of One: *Promega Corp. v. Life Technologies Corp.*," *AIPLA Chemical Practice Chronicles Newsletter*, Winter 2015.
- Coauthor. "Only a True Divisional Can Enter the Safe Harbor of 35 U.S.C. § 121," *AIPLA Chemical Practice Chronicles*, Fall 2015.
- Coauthor. "GSK v. Banner Pharmacaps, Inc.: A Refresher on Adequate Written Description Support for Structural Limitations in Chemical Claims," *AIPLA Chemical Practice Chronicles Newsletter*, Fall 2014.
- Coauthor. "Navigating the Supreme Court's 2013-2014 Patent Docket," *CIPA Journal*, June 2014.
- "PPH 2.0: Global Prosecution in the Fast Lane," *IP Frontline*, Nov. 18, 2013.
- Coauthor. "Inter Partes Review: Making Heads or Tails of the 'Reasonable Likelihood of Success' Standard," *BNA's Patent, Trademark & Copyright Journal*, Oct. 25, 2013.
- Coauthor. "Using Supplemental Examination Effectively to Strengthen the Value of Your Patents," *BNA's Patent, Trademark & Copyright Journal*, Sept. 30, 2011.

## Tab 2 – Course Materials (articles, publications, other materials)

# 2015 Federal Rules of Civil Procedure Amendments: A Powerful Discovery Tool

2/8/2016 by Matthew Hamilton | Pepper Hamilton LLP

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**Pepper Hamilton LLP**  
Attorneys at Law

## The amended rules aid in controlling the scope of discovery and managing its risks.

Two months have passed since the effective date of the 2015 amendments to the Federal Rules of Civil Procedure, which are applicable to all cases filed thereafter as well as cases then pending “insofar as just and practicable.” It is now becoming clear that courts are paying close attention to the significant changes made to the scope of discovery as governed by proportionality as well as the consequences of failing to preserve electronically stored information (ESI). The amendments are a “big deal” according to Chief Justice John Roberts, who addressed them at length in his [Year-End Report to the Judiciary](#), because they “provide a concrete opportunity for actually getting something done.”

## Changes to the Rules

The scope of discovery under the amended Rule 26(b)(1) is no longer defined by the oft-abused “reasonably calculated to lead to the discovery of admissible evidence” standard, but rather by the common-sense concept of

proportionality. Under the new rule, parties may obtain discovery:

that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Sanctions for failure to preserve ESI are no longer based on a court's inherent, and unlimited, authority to punish spoliation, but rather are explicitly limited by amended Rule 37(e)(1) to situations where the information cannot be restored or replaced and must be "no greater than necessary" to cure the resulting prejudice. Rule 37(e)(2) further provides that a court must find a party intended to deprive its opponent of the information lost before imposing the severe sanctions of an adverse inference instruction or dismissal of the case.

### **Recent Decisions Under the Amended Rules**

Two recent decisions illustrate the tangible and favorable results that can be obtained by application of the amended Rules. The first, *Nuvasive, Inc. v. Madsen Medical, Inc.*, No. 13-cv-2077 BTM (RBB) (S.D. Ca. Jan. 26, 2016), reverses a spoliation order entered prior to the effective date of the amendments in order to conform to the amended Rules' requirement that any adverse inference instruction be based on a finding that the party intended to deprive its opponent of the ESI at issue. The second, *Henry v. Morgan's Hotel Group, Inc.*, No. 15-cv-1789 (ER)(JLC) (S.D.N.Y. Jan. 25, 2016), makes clear that the scope of discovery from third parties is also limited by proportionality.

In *Nuvasive*, the plaintiff, a medical device company, moved on December 10, 2015 for reconsideration of a July 2015 sanctions order in which the court ruled that it would give an adverse inference instruction based on a failure to preserve text messages. The court agreed that the amended Rules should apply retroactively, reasoning that it had not yet given its adverse inference

instruction because the trial had not yet taken place, and that the motion for reconsideration was timely filed 10 days after the new Rules were effective. Reexamining its prior sanctions order, the court found that it did not comply with amended Rule 37(e)(1) because its adverse inference instruction would have the same effect as an order entered pursuant to Rule 37(e)(2), which requires a finding of intent to deprive an opponent of the use of ESI in the litigation. Having previously found no intent to deprive, the court revised its order to comply with amended Rule 37(e)(1) and “employ measures no greater than necessary to cure the prejudice.” Accordingly, the court removed its adverse inference instruction and instead will permit both sides to present evidence concerning the loss and will instruct the jury that it may consider that along with all other evidence in making its decision. The *Nuvasive* case illustrates how amended Rule 37(e)(1) can protect a party who inadvertently fails to preserve ESI.<sup>1</sup>

In *Henry*, the plaintiff — a waiter who alleged employment discrimination and retaliation against his former employer, defendant Morgan’s Hotel Group, Inc. — moved to quash three subpoenas served by Morgan’s Hotel Group on his prior employers. The plaintiff argued, in part, that the subpoenas sought irrelevant information. The court agreed, reasoning that the scope of discovery was no longer defined as “reasonably calculated to lead to the discovery of admissible evidence,” but rather, pursuant to the amended Rule 26(b)(1), must be “relevant to any claim or defense and proportional to the needs of the case.” Although the defendant argued its subpoenas sought relevant information because the plaintiff claimed to have been an exceptional waiter at his prior jobs, the court found that the plaintiff’s skill as a waiter had little bearing on his claims of discrimination. The *Henry* case makes clear that the amended Rule 26(b)(1) standard can significantly aid in limiting the abuse of third-party discovery.

## **Guidance on Using the New Rules**

The amended Rules offer powerful tools to control the scope, and resulting cost and burden, of discovery and to manage the risks inherent in ESI and its

preservation at all stages of litigation. It is never too early, or too late, to think about putting these Rules to work. From the outset of a matter, the scope of discovery should be negotiated through the prism of proportionality — is the burden and expense of the request proportional to the needs of the case? If not, amended Rule 26(b)(1) provides a sound basis to resist its inclusion in a discovery plan, or for a motion to quash or for a protective order.

If an opponent alleges spoliation of ESI, amended Rule 37 offers a framework for a response — can the information be recovered or replaced? If not, any sanction must be the minimum necessary to address it. Crucially, in the absence of a finding of intent to deprive a party of the information, adverse inference or case dispositive sanctions are not available. Even if a sanctions order has already been entered pursuant to the prior standard, a motion for reconsideration under the amended Rule 37 may offer some relief, particularly where there has been no finding of intent.

## Endnote

<sup>1</sup> Compare the *Nuvasive* case with the result in [DVComm, LLC v. Hotwire Communications, LLC](#), No. 14-5543 (E.D.Pa. Feb. 3, 2016), where the court, finding that the plaintiff had intentionally deleted relevant emails, ordered an adverse inference instruction pursuant to Rule 37(e)(2).

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## LATEST POSTS

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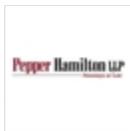
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## WRITTEN BY:



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# Intellectual Property & Technology Law Journal

## *The State of Patent Law: The Interplay of Recent, Pending, and Proposed Changes*

By Jennifer H. Burdman and William J. Sauers

Volume 27, Number 10, October 2015

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Recent developments in the field of patent law have given weight to the old adage that the only thing that is constant is change. Enacted in 2011, the America Invents Act (AIA) instituted sweeping changes to rules related to obtaining, enforcing, and challenging patents. Since that time, the U.S. Supreme Court has issued several decisions in the field of patent law, touching on patentability, validity, claim construction, and enhanced damages.

While the impact of these changes is still reverberating through industry and the courts, additional changes are afoot. Amendments to the Federal Rules of Civil Procedure (Federal Rules) set to take effect later this year will impact pleading requirements for patent infringement actions and discovery practice. Meanwhile, in Congress, both the House and Senate Judiciary committees introduced, considered, and reported out bipartisan patent litigation reform primarily directed at curbing abusive patent litigation. Despite early indications to the contrary, however, the proposed legislation appears to have run into headwinds and none of the bills were considered prior to the summer recess.

Although it is difficult to know exactly why the momentum of support proposed bills slowed this summer, a review of the primary issues addressed

by the bills shows that not only are there substantive differences between the bills that likely impacted the process, but also that upcoming changes to the Federal Rules and recent court decisions are directed to many of the same issues. As discussed below, this may have led to a cooling-off period in Congress while all involved consider the impact of these changes to determine what – if any – additional legislation is necessary to curb abusive patent litigation.

### **Overview of the Pending Legislation**

The House of Representatives and Senate this year each introduced several bills related to patent reform. The primary bills are:

- The House *Innovation Act* (H.R. 9)<sup>1</sup>;
- The Senate *Protecting American Talent and Entrepreneurship Act* (S. 1137), known as the “PATENT Act.”<sup>2</sup>;
- The Senate *Support Technology and Research for our Nation’s Growth Patents Act* (S. 632), known as the “STRONG” Patents Act; and
- The House *Targeting Rogue and Opaque Letters Act* (H.R. 2045), known as the “TROL” Act.

Among other proposed changes, the House *Innovation Act* and Senate PATENT Act contain

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provisions aimed at reducing costs associated with patent cases, including:

1. heightened pleading requirements;
2. limits on discovery;
3. transparency in patent ownership;
4. customer stays in certain circumstances;
5. awards of attorneys' fees to the prevailing party, including possible joinder of "interested parties" in order to satisfy the fee award; and
6. changes to the claim construction standard applied by the U.S. Patent and Trademark Office ("PTO") in post-grant challenges to patents.

The STRONG Patents Act also includes proposed rules regarding post-grant proceedings and additionally would govern what patent holders can say in demand letters that request licensing fees or settlements. TROL Act is primarily directed at demand letters.

### **Analysis of the State of Play**

There appears to be a general consensus that any legislation should deal with abusive litigation. The particular areas addressed by the various legislation, such as pleading standards and attorneys' fees, are areas that could have direct impact on abusive patent litigation. So why has there been a delay? There are, to be sure, various interest groups and industry consortiums lobbying for and against various provisions. But there is likely more to the story – many of the issues addressed by the proposed legislation are already being addressed to some degree by changes in how the courts apply the law and in the upcoming changes to the Federal Rules. Using several key provisions of the pending legislation as a map, we consider how they differ and intersect with changes in the law and practice.

### **Heightened Pleading Requirements**

The issue of pleading requirements in patent litigation has been hotly contested for a number of years. One of the primary issues is the application of the "notice pleading" requirement of Federal Rule of Civil Procedure 8(a). Under this rule, "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Historically, courts have interpreted this standard as requiring no more information than is sought in Form 18 to the Appendix of the Federal Rules. This is because Rule 84 states that "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." Form 18 requires only:

1. an allegation of jurisdiction;
2. a statement that the plaintiff owns the patent;
3. a statement that the defendant has been infringing the patent by making, selling, and using a device embodying the patent;
4. a statement that the plaintiff has given the defendant notice of its infringement; and
5. a demand for an injunction and damages.

Thus, under Form 18, a defendant accused of patent infringement may not, at the pleadings stage, know which claims of the patent are being asserted against it or, in some cases, which of its products or processes are accused of infringing each asserted claim.

Plaintiffs have been using the limited requirements in Form 18 to skirt the Rule 8 notice pleading standard. In 2007, the Supreme Court explained the standard to be applied in assessing a party's claims under Rule 8. In *Bell Atlantic Corp. v. Twombly*, an antitrust case, the Court held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will

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not do.”<sup>3</sup> In 2009, the Supreme Court clarified that this analysis was not limited to antitrust cases and went on to hold that “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”<sup>4</sup>

To date, however, the Court of Appeals for the Federal Circuit has not applied the Supreme Court’s instruction in *Twombly* to patent claims alleging direct infringement. Instead, the Federal Circuit consistently has relied upon Form 18 with respect to direct infringement claims, holding that “a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend . . . . A plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent.”<sup>5</sup> In fact, the Federal Circuit has held that “to the extent . . . that *Twombly* and its progeny conflict with the Forms and create differing pleadings requirements, the Forms control,” and that “any changes to the Federal Rules of Civil Procedure ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’”<sup>6</sup>

The Judicial Conference of the United States, the national policy-making body for the federal courts, heard the Federal Circuit loud and clear and in September 2014, voted to abolish Rule 84 and get rid of the forms, including Form 18. The Supreme Court approved this change to the Federal Rules this past May, and absent Congressional modification, the change will go into effect on December 1, 2015.

In the meantime, since *Twombly*, defendants have attempted, with limited success, to have complaints containing the bare bones notice pleading of Form 18 dismissed. Indeed, some district courts have discounted Form 18 and instead applied the Supreme Court’s instruction in *Twombly* to all patent infringement claims, despite

the Federal Circuit’s rulings to the contrary.<sup>7</sup> Other district courts have enforced the limited applicability of Form 18, in line with the Federal Circuit’s guidance that it applies solely to allegations of direct infringement, and not to indirect infringement or validity counterclaims.<sup>8</sup>

In response to the concern about the limited information required by Form 18, several jurisdictions with large patent infringement caseloads utilize local patent rules (LPRs) that require early disclosure of many of the same facts that may be required by an application of *Twombly* or by the pending bills. For example, the LPRs for the Eastern District of Texas, the busiest patent litigation forum in the United States, require many of the same disclosures set out in the proposed House and Senate bills together with a related document production 10 days prior to the Initial Case Management Conference.<sup>9</sup> The Initial Case Management Conference, however, does not have to occur until 60 days after the first defendant appears.<sup>10</sup>

Nevertheless, proponents of heightened pleading standards argue that LPRs are insufficient to curb abusive behavior because the defendant is still required to enter an appearance, respond to the complaint, and engage in discovery. The plaintiff can pay lip service to the LPRs and get deep into discovery before a motion can be filed by the defendant, much less decided. Absent settlement, the defendant is left to incur substantial cost and provide responsive information that the plaintiff properly should have obtained on its own, pursuant to its pre-filing investigation. Proponents also claim that the elimination of Form 18 does not go far enough to address these issues.

In response to these concerns, both the House and Senate bills significantly raise the pleading requirements for patent cases by requiring plaintiffs to assert the particular patents and claims at issue, the specific accused products, and

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information on how the accused products allegedly infringe each asserted claim. The House bill additionally requires details about the principal business of the party alleging infringement, identification of any other litigations asserting the patent(s), and whether the asserted patents are essential to practicing an industry standard. Proponents of the bills assert that by requiring additional information at the pleading stage the plaintiff will be required to engage in a fulsome pre-filing investigation and the defendant will be able to file a more meaningful motion to dismiss before making an appearance.

Regardless of whether Congress formally changes the pleading standards, it would seem likely that without Form 18 to rely upon, the district courts will interpret *Twombly* to require some additional specificity in order to satisfy the notice provisions of Rule 8(a). Additional information regarding the accused products is likely, especially in cases where a broad allegation of infringement could include large numbers of disparate products. Courts also may conclude that notice pleading under Rule 8 requires additional specificity regarding the particular patent claims that the accused products are alleged to infringe and the particular types of infringement alleged, especially where the patent includes large numbers of products and/or claims. There is the possibility, however, that courts with extensive LPRs and early disclosure requirements will continue to point to those rules and adopt fairly low pleading requirements for allegations of infringement, even if they cannot expressly continue to rely on Form 18.

No matter the jurisdiction, the cost of pre-filing investigations is likely to increase, as are early motions practice regarding the sufficiency of allegations in a complaint and attempts to amend complaints to accuse additional products and discovery motions, as discussed in more detail below.

## **Limits on Discovery**

The burden of discovery on defendants in a patent litigation can be tremendous. For larger companies with broad product portfolios, multiple divisions, and far-flung design and manufacturing facilities, costs can quickly escalate. For smaller companies, the overall cost may be smaller, but the potential impact on daily operations can be difficult to limit. By contrast, non-practicing entities (NPEs), a frequent plaintiff in patent litigation, often have comparatively little documentation to produce, as they by definition do not make a product that practices the asserted patent(s). As a result, perhaps even more than in other types of litigation, patent litigation often has a disproportionate cost and disruption impact on defendants, which can enable aggressive plaintiffs to extract a settlement on claims that may lack merit.

Amendments to the Federal Rules set to go into effect this December make significant changes to the scope, timing, and nature of discovery that will impact the administration and strategy employed in patent cases, with a particular impact on NPE patent litigation. One of the key changes is the inclusion of a “proportionality” requirement to the overall scope of discovery. Amended Rule 26(b)(1) states that in addition to the prior requirement that “parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense,” the discovery must be “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” The language is familiar, as it is transferred in large part from current Rule 26(b)(2)(C)(iii), a rule that had been applied more in the context of motions than as a threshold requirement.

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In fact, the Advisory Committee notes to the amended rule explain that proportionality has always been part of the discovery analysis and the 2015 amendments seek to clarify that point. The notes explain that the intent is for the proportionality requirement to apply to all parties, and not to create a burden on the party issuing discovery to establish proportionality. Despite that objective and the Advisory Committee's admonition that the new wording should not be used as a boilerplate objection, it is likely that objections to discovery requests will cite this language. Parties propounding discovery will no doubt point to those same factors to justify broad requests, leaving the courts to resolve what is likely to be an initial surge in motions practice regarding the amended rule. The revised rule should nonetheless benefit defendants in NPE patent litigation to the extent the rule has the effect of limiting the volume of discovery, given the relatively small amount of documents in the possession, custody, or control of the NPE as compared to the potentially enormous number of documents with a defendant.

Perhaps in an attempt to appear even-handed and assist plaintiffs seeking broad discovery, Amended Rule 26(b)(1) eliminates the wording "reasonably calculated to lead to the discovery of admissible evidence," and states instead that "Information within the scope of discovery need not be admissible in evidence to be discoverable." The Advisory Committee notes indicate that the amendment is directed to eliminating the standard objection that a request is not reasonably calculated to lead to the discovery of admissible evidence. The discovery requests, however still must be relevant to a party's claim or defense in combination with the proportionality factors.

Another amendment places additional obligations on the timing of production and objections to discovery requests. Currently, a party responding to a discovery request will commonly state that it will produce responsive

documents subject to its objections. This is in keeping with the wording of Rule 34(b)(2) that a responding party must state that the production "will be permitted as requested or state [an objection] to the request, including the reasons." Frequently, the reason provided would simply be that the request is "overly broad and unduly burdensome." Such a general response will no longer be sufficient under Amended Rule 34(b)(2)(B). The newly amended rule will require the responding party to "state with *specificity* the grounds for objecting to the request" including the reasons. Amended Rule 34(b)(2)(B) will still allow the responding party to state that it will produce documents or ESI rather than an inspection, but if it does so, "the production must then be complete no later than the time for inspection specified in the request or another reasonable time specified in the response."

What may be the most difficult change for parties to implement when responding to discovery requests will be Amended Rule 34(b)(2)(C), which adds a new requirement that "[a]n objection must state whether any responsive materials are being withheld on the basis of [an] objection." Even where a party unilaterally limits the scope of its search to certain time periods, it may not fully know what documents are being withheld by the time its objections are due, leading to potential complications at the time of the response and later. Perhaps anticipating this issue, the Amended Rule 26(d)(2) allows a party to deliver Rule 34 discovery requests 21 days after the summons and complaint are served on a party, though the requests are not deemed served until the first Rule 26(f) conference. Allowing delivery of discovery requests before the first Rule 26(f) conference is intended to foster early discussion of any problems with the requests. While this mechanism could enable parties to identify and hopefully resolve discovery disputes on their own, litigants may be unwilling to utilize the option lest

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they give the other party an advantage in the form of additional time.

The proposed House and Senate bills take a different approach, as they would stay discovery in certain situations. In cases where the claims of a patent need to be construed by the court, the Innovation Act proposes to limit discovery “to information necessary for the court to determine the meaning of the terms used in the patent claim.” The PATENT Act, by contrast, proposes a stay of discovery pending the resolution of motions to dismiss, transfer venue, or sever parties. Both proposals have been subject to criticism that they will have the effect of slowing litigation, result in the filing of additional early motions, and in practice lead to a waste rather than conservation of judicial resources.

Even without additional legislative changes, the effect of the forthcoming changes to the Federal Rules will be widespread. Using the changes to pleading requirements discussed above as an example, if courts interpret *Twombly* to require that plaintiffs identify particular products in a complaint to satisfy Rule 8, plaintiffs that elect to identify fewer products may face the risk that they cannot later accuse or obtain damages on additional products not included in the complaint if those products were available to the plaintiff at the time of filing. Plaintiffs faced with this situation will no doubt seek broad early discovery to identify additional products in advance of pleading amendment deadlines, pointing to the proportionality requirements to claim that the information sought – such as CAD drawings, schematics, or other non-public information – is on balance more easily and cost-effectively obtained from the defendant and is important to resolution of the issues in the case. Defendants, for their part, will argue that the scope of the case was set in the pleading, and that the burden was on plaintiff to identify accused products based on publicly available information prior to filing.

District court responses to this issue will likely vary by jurisdiction. If, for example, a plaintiff accuses categories or product lines in a complaint and exemplar products in each such group, a court may determine that the plaintiff did not need to identify each sub-product in the complaint if the differences between the identified and non-identified products are not relevant to the question of infringement. A court that follows this approach may find that fact and expert discovery become protracted as additional products are added unless the court or parties can agree on representative products and streamlined proofs.

The answer may be very different in jurisdictions that have LPRs that address the timing and scope of discovery. The Eastern District of Texas, for example, requires disclosures at least as specific as the proposed bills prior to discovery, and the repercussions for failing to identify accused products where the necessary information was publicly known can result in exclusion of those products even where the plaintiff identified categories.<sup>11</sup>

Given the uncertainty surrounding how courts will interpret and apply the amended Federal Rules, parties to patent litigation will need to reevaluate longstanding litigation strategies. Hope springs eternal that the risks attendant to this uncertainty will lead more litigants to engage in meaningful discussions regarding the scope and conduct of discovery.

### **Customer Stay**

A common concern in patent litigation is the effect on customers of the allegedly infringing product. Oftentimes, the patent owner will choose not to file suit against the original supplier of the product, but instead will sue any number of its customers (frequently at the same time). If the supplier then seeks to intervene in the actions, or files a declaratory judgment action against the patent owner, it is met with a firestorm of motions by the patent owner seeking to prevent it from

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getting involved. Historically, courts have tackled the issue head-on and recognized the waste of resources and the potential for inconsistent verdicts in adjudicating multiple customer cases in parallel, potentially in different jurisdictions. Traditionally, a later filed case would be stayed, assuming the two actions sufficiently overlapped, under a doctrine referred to as the “first-to-file rule.” However, in the cases where those first-filed suits are against customers and the later-filed suit is with the supplier of the accused product(s), the first-to-file rule is trumped by the judicial economy presented in staying the customer suits and simply proceeding with the single suit brought by (or against) the source of the infringing products.<sup>12</sup>

Presumably to provide a clear direction to the courts on this issue, another measure included in each Congressional bill is a “customer stay” aimed at curbing the proliferation of co-pending litigations against the provider of an allegedly infringing product and its customers. Each bill includes protections for those customers, and would require a court to stay an infringement litigation against a customer of a product, if (in addition to other requirements) the manufacturer of the product is a party to the same or to another infringement action on the same patent. The stay is available only to those at the end of the supply chain who are selling or using a technology acquired from a manufacturer without materially modifying it and excludes “an entity that manufactures or causes the manufacture of a covered product or covered process, or a relevant part thereof.”

### **Shifting of Attorney Fees**

A prevailing party in patent litigation seeking an award of attorneys’ fees previously faced a high substantive and evidentiary standard. Many have posited that the low risk of an attorneys’ fee award against a non-prevailing party was a key factor behind many patent litigations. The

Supreme Court’s 2014 decision in *Octane Fitness v. Icon Health & Fitness, Inc.*, however, effected a sea change on the issue of attorneys’ fees.<sup>13</sup>

In *Octane Fitness*, the Supreme Court rejected the Federal Circuit’s formulation for evaluating whether a case is “exceptional” under Section 285 of the Patent Act and thus potentially subject to an award of attorney fees. The Federal Circuit had required that to establish a case is exceptional, a prevailing party must show “material inappropriate conduct” or that the case was both “objectively baseless” and “brought in subjective bad faith” by clear and convincing evidence. The Supreme Court rejected that test as too stringent, and held “that an ‘exceptional’ case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” The Supreme Court further held that the clear and convincing evidence standard was incorrect, and “district courts may determine whether a case is exceptional on a case-by-case exercise of their discretion based on a totality of the circumstances,” based on a preponderance of the evidence standard.

Not surprisingly, district courts have awarded attorneys’ fees far more often since *Octane Fitness*. Earlier this year, the Federal Circuit Bar Association sent a letter to the House Judiciary Committee summarizing the results of an analysis of all orders on fee-shifting since the April 2014 *Octane Fitness* decision, finding that fee motions were granted at a rate almost three times as high – 36 percent – as the 13 percent rate in the year preceding *Octane Fitness*, and that the grant rate was 50 percent for the first three months of 2015.<sup>14</sup>

Against this backdrop, both the House Innovation Act and the Senate Patent Act include provisions related to fee shifting. The Senate

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approach includes a test similar to the one set forth in *Octane Fitness*, and would require an award of attorneys' fees when the winning party files a motion and the district court makes a finding that the non-prevailing party was not "objectively reasonable." The provision would also allow a judge to consider "undue economic hardship to a named inventor or institution of higher education" when determining if "special circumstances" make a fee award unjust, apparently in response to concerns that fee-shifting provisions may encourage smaller organizations and individual patent holders to settle a case, rather than take the risk of losing and paying for the winner's attorneys' fees.

Those concerns would be more pronounced under the fee-shifting provisions of the House Innovation Act. The Innovation Act would move beyond *Octane* (and the Senate PATENT Act) and create a rebuttable presumption that attorneys' fees are to be awarded to the prevailing party unless the court finds that the non-prevailing party's position and conduct "were reasonably justified in law and fact or that special circumstances . . . make an award unjust." Proponents of the Innovation Act may well point to recent statistics showing that 2015 is set to be a record year for patent filings, and more definitive fee-shifting provisions remain necessary to address abusive patent litigation.<sup>15</sup>

The delay in consideration of the pending House and Senate bills will provide additional time to evaluate the effect of *Octane Fitness* on the number and substantive merit of patent infringement filings as well as any resulting fee awards. That additional information may enable Congress and industry to determine whether further changes to the law regarding fee awards are necessary.

### **Transparency of Patent Ownership**

Related to the issue of fee awards is transparency of ownership of asserted patents.

Often, NPEs create separate entities that have little or no assets for the purpose of asserting different patents or for different infringement suits. Despite the fact that there is ultimately a separate entity with a financial interest in the case, that interested entity is not disclosed, hindering the ability of defendants to enforce fee awards or to obtain potentially relevant discovery. And NPEs have consistently avoided attempts by defendants to get such information. For example, a recent case in the Southern District of Texas settled shortly after the defendants were able to serve a third-party complaint on the purported parent of the NPE plaintiff.<sup>16</sup> During oral argument, counsel for defendants put the issue to the Court, arguing that "[NPEs] can sue defendants, make them spend attorneys' fees, or settle. And if they lose on attorneys' fees, the plaintiff – the made-up plaintiff – is judgment proof."<sup>17</sup>

In response to this concern, the House Innovation Act and Senate PATENT Act contain new requirements for "transparency" in patent ownership. The bills would require that the plaintiff disclose the assignee(s) of the patents, any licensee empowered to sublicense or enforce the patents, any other entity having a "financial interest" in the patents, and the "ultimate parent entity" of any of the parties.

The House and Senate bills also contain provisions regarding the mechanics of enforcement of an attorneys' fees award aimed directly at the "real" party. The House bill addresses the issue at the end of the litigation, stating that when a party is unable to pay an award of attorneys' fees and has no substantial interest in the litigation beyond asserting the patent, a district court shall grant a motion to join another interested party that has a direct financial interest in the patents. Presumably, the plaintiff would have disclosed that other interested party previously pursuant to the transparency provisions discussed above. While the Senate bill does not

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directly mention joinder, it allows the defendant to notify the Court that it believes the plaintiff is an NPE, triggering an obligation by plaintiff to dispute the assertion, state that it would have sufficient funds to pay a fee award, or identify another party that can. This presumably would allow for an early motion for joinder if appropriate.

### **Post-Grant Review Reforms**

The AIA created new procedures to seek post-grant review of issued patents at the PTO that have become a frequent tool of patent litigation defendants. The two main post-grant proceedings, post grant review (PGR) and inter partes review (IPR), cost substantially less than patent litigation and can provide grounds to stay litigation pending completion of the review by the PTO. In exchange, parties that seek post-grant review (or those in privity with them) generally are prevented from raising in court an argument they could have raised at the PTO.

Perhaps the most contentious aspect of these proceedings is that the standard applied in post-grant review proceedings differs from that applied by the district courts. The PTO applies the Broadest Reasonable Interpretation (BRI) standard to construe the meaning of a challenged patent claim, while the district courts apply a narrower standard, namely “the meaning that [a] term would have to a person of ordinary skill in the art in question at the time of the invention.”<sup>18</sup> The broader BRI standard, of course, makes it easier to challenge patent claims at the PTO because broadly construing a patent claim makes it more vulnerable to invalidity arguments of anticipation and obviousness. As a result, there has been a tidal wave of post-grant proceedings instituted since the effective date of the AIA.

Patentees have complained that the AIA should be amended to require the PTO to replace the BRI standard with the narrower standard applied by the district courts. Earlier this year, however, the

Federal Circuit issued a six to five *en banc* decision letting the BRI standard stand, with the dissenting judges writing in support of the standard applied by the district courts.<sup>19</sup> Unless the Supreme Court decides to take up the issue, it appears that there will be no change to BRI standard at the PTO absent legislation.

Bills introduced by the House and Senate seek to do just that. The House Innovation Act and the Senate PATENT Act and STRONG Patents Act all include provisions that would supplant the BRI standard with the claim construction standard used by the district courts. Not surprisingly, the proposed change has been the subject of much debate.

The PTO, for its part, has issued revisions to the post-grant review process to allow patentees to more easily amend claims during the process and obtain additional discovery. The logic is that the broader BRI standard, as used during examination, is appropriate if patentees will now be allowed to amend claims in response to anticipation and obviousness arguments more like they could during examination. If not, opponents say, using a broader standard without any real ability to amend claims takes the “review” out of post-grant review and makes the PTO act as judge and jury under a different standard than in district court, unfairly impinging on the rights of patentees.

It appears that the public criticism of, and recent amendments to, the rules for post-grant review proceedings are having some effect. Recent statistics indicate that the PTO may be accepting fewer petitions for post-grant review, and allowing more amendments. These numbers may simply reflect that the initial deluge of post-grant review proceedings attacked mostly business method patents, which were generally viewed as weak and granted without in-depth review by the PTO at the advent of the Internet age, and that the patents now being asserted are of a more

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“patentable” nature. Regardless of the reason, proponents of the current post-grant review BRI standard believe that the conclusion to be drawn is that the current standard is correct. The issue is far from resolved.

### **Conclusion**

Many thought that the AIA and recent Supreme Court decisions would be the death knell for NPE patent litigation. After a temporary decrease, however, filings by NPEs are on the uptick, with over 3,100 new federal patent cases filed in the first half of 2015, on pace to set a record.<sup>20</sup> Some argue that this is due simply to the fact that the

dust has yet to settle from passage of the AIA and the subsequent spate of decisions from the Supreme Court, and that further legislation is premature at this point in time, especially given the upcoming changes to the Federal Rules.

Due to the delay in enactment of any additional legislation, Congress, industry, and the courts will have an opportunity to assess the impact of the upcoming changes to the Federal Rules in combination with further application of the Supreme Court’s recent decisions. Given the stakes involved, these issues will continue to be the subject of heated debate for the foreseeable future.



Jennifer H. Burdman is a partner with King & Spalding’s Intellectual Property practice group in Washington. She regularly counsels clients on a broad range of matters relating to the acquisition, protection, licensing, and enforcement of intellectual property rights. Ms. Burdman has extensive trial experience including numerous complex, high-stakes litigations in patent infringement, trade secret misappropriation, and contractual matters involving intellectual property rights. In 2015, *The National Law Journal* named Ms. Burdman a “Rising Star” in Washington, DC.



William J. Sauers is a partner with the Intellectual Property practice group in Washington. Mr. Sauers has litigated patent, trademark, trade secret and copyright disputes before district courts, the U.S. Patent and Trademark Office’s Trademark Trial and Appeal Board, the U.S. International Trade Commission, and the World Intellectual Property Organization. Prior to entering private practice, he served as an attorney with the U.S. Patent and Trademark Office.

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<sup>1</sup> <http://www.judiciary.house.gov/index.cfm/the-innovation-act>

<sup>2</sup> <http://www.judiciary.senate.gov/meetings/judiciary-committee-members-introduce-bipartisan-patent-act>

<sup>3</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

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- <sup>4</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557).
- <sup>5</sup> *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007) (vacating dismissal of *pro se* plaintiff's complaint that conformed to Form 18 (then Form 16)).
- <sup>6</sup> *In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) (internal citations omitted).
- <sup>7</sup> See e.g., *Deerpoint Group, Inc. v. Acqua Concepts, Inc.*, No. 1:14-cv-01503-SAB, 2014 WL 7178210 (E.D. Ca. Dec. 16, 2014); *Macronix International Co. v. Spansion Inc.*, 4 F. Supp. 3d 797 (E.D. Va. 2014).
- <sup>8</sup> See e.g., *Aubin Industries, Inc. v. Caster Concepts, Inc.*, No. 2:14-cv-02082-MCE-CKD, 2015 WL 3914000 (E.D. Ca. June 25, 2015) (applying the *Iqbal* and *Twombly* standard to non-infringement counterclaims to the extent that the originating claims were for indirect infringement); *Virginia Innovation Sciences, Inc. v. Samsung Electronics Co., Ltd.*, 983 F. Supp. 2d 700, 704 (E.D. Va. 2013) (noting that the *Twombly* standard does not apply to direct infringement claims, but does apply to indirect or willful infringement claims); *Gradient Enterprises, Inc. v. Skype Technologies, S.A.*, 932 F. Supp. 2d 447, 452 (W.D.N.Y. 2013) (finding *Twombly* standard does not apply to direct infringement claims, but does apply to indirect infringement claims as well as patent invalidity claims).
- <sup>9</sup> See Local Patent Rules for the Eastern District of Texas at Appendix B, Patent Rule 3-1.
- <sup>10</sup> See *id.* at CV-16.
- <sup>11</sup> See e.g. *Keranos v. Silicon Storage*, 2015 WL 4790475, Case Nos. 14-1360 and 14-1500 (Fed. Cir. August 13, 2015).
- <sup>12</sup> See e.g., *In re Google Inc.*, 588 Fed. Appx. 988 (Fed. Cir. 2014).
- <sup>13</sup> *Octane Fitness v. Icon Health & Fitness, Inc.*, 572 U.S. \_\_\_, 134 S.Ct. 1749 (2014).
- <sup>14</sup> See April 13, 2015, Letter from Edgar Haug, President Elect Federal Circuit Bar Association, to Chairman Bob Goodlatte and Ranking Member John Conyers, Jr.
- <sup>15</sup> Amanda Ciccattelli, "Record Number of New Federal Patent Cases Filed in First Half of 2015," *Inside Counsel*, July 20, 2015.
- <sup>16</sup> See *Parallel Separation Innovations LLC v. National Oilwell Varco, Inc. et al*, 2:14-cv-00556 (S.D.TX) at D.I. 68, 68, 85, and 86.
- <sup>17</sup> See Law360, July 24, 2015, [http://www.law360.com/ip/articles/683308?nl\\_pk=79db45d8-fbc5-4857-b87c-45f1b71434d4&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=ip](http://www.law360.com/ip/articles/683308?nl_pk=79db45d8-fbc5-4857-b87c-45f1b71434d4&utm_source=newsletter&utm_medium=email&utm_campaign=ip)
- <sup>18</sup> *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc).
- <sup>19</sup> *In re: Cuozzo Speed Technologies, LLC*, 2015 WL 4097949, Case No. 14-1301 (Fed. Cir. July 8, 2015).
- <sup>20</sup> Amanda Ciccattelli, "Record Number of New Federal Patent Cases Filed in First Half of 2015," *Inside Counsel*, July 20, 2015 (<http://www.insidecounsel.com/2015/07/20/record-number-of-new-federal-patent-cases-filed-in>).

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## **2015 Year-End Report on the Federal Judiciary**

In 1838, John Lyde Wilson, a former governor of South Carolina, made a grim contribution to the literature of dispute resolution by publishing *“The Code of Honor; or Rules for the Government of Principals and Seconds in Duelling.”* That 22-page booklet, sized to fit comfortably alongside a gentleman’s matched pair of dueling pistols, specified the procedure for issuing a challenge, the duties of seconds, and the proper conduct of the duel itself. More detailed than its predecessors, the Irish and French dueling codes, Wilson’s rulebook set out time limits, the form and methods of written communications, the obligation to attempt reconciliation without bloodshed, and—if attempts at mediation failed—how to pace off the field of battle. Wilson professed that he was not advocating that adversaries settle their disputes through duels, but he claimed that dueling was inevitable “where there is no tribunal to do justice to an oppressed and deeply wronged individual.” He suggested that laying out practices and procedures to ensure that duels would be conducted fairly—including

provisions for resolving disputes through apology and compromise—would in fact save lives.

It may be that Wilson's code had exactly the opposite effect, glorifying and institutionalizing a barbarous practice that led to wanton death. Our Nation had lost Alexander Hamilton to a senseless duel in 1804. Abraham Lincoln and Mark Twain could have perished in duels if their seconds, in each instance, had not negotiated an amicable solution. But others were not so fortunate; one historian has calculated that, between 1798 and the Civil War, the United States Navy lost two-thirds as many officers to dueling as it did to more than 60 years of combat at sea.

Public opinion ultimately turned against dueling as a means of settling quarrels. By 1859, eighteen of the 33 States of the Union had outlawed duels. Following the Civil War, a public weary of bloodshed turned increasingly to other forums, including the courts, to settle disputes. But reminders of the practice persist. When Kentucky lawyers are admitted to the bar, they are required, by law, to swear that they have not participated in a duel.

Today, Wilson's pamphlet stands on the bookshelf as a largely forgotten relic of a happily bygone past. But it is also a stark reminder of government's responsibility to provide tribunals for the peaceful resolution

of all manner of disputes. Our Nation's courts are today's guarantors of justice. Those civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure.

The Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.*, empowers the federal courts to prescribe rules for the conduct of their business. The Judicial Conference—the policy making body of the federal judiciary—has overall responsibility for formulating those rules. Consistent with that charge, Congress has directed the Conference to “carry on a continuous study of the operation and effect of the general rules of practice and procedure.” 28 U.S.C. § 331. The primary work is done through the Conference's Committee on Rules of Practice and Procedure (known as the Standing Committee), which in turn enlists guidance from advisory committees that focus on the specialties of appellate, bankruptcy, civil, and criminal procedure, and the rules of evidence. Those committees solicit recommendations, conduct public hearings, draft proposed rules, and propose amendments for the Judicial Conference's consideration. If the Judicial Conference concurs, the proposed rules and amendments, together with a report on their promulgation, are submitted to the Supreme Court for its approval. If the Court approves, the rules are then laid before Congress,

by the annual deadline of May 1, for its examination. Unless Congress intervenes by December 1, the new rules take effect.

This process of judicial rule formulation, now more than 80 years old, is elaborate and time-consuming, but it ensures that federal court rules of practice and procedure are developed through meticulous consideration, with input from all facets of the legal community, including judges, lawyers, law professors, and the public at large. Many rules amendments are modest and technical, even persnickety, but the 2015 amendments to the Federal Rules of Civil Procedure are different. Those amendments are the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes.

The project goes back to 2010, when the Advisory Committee on Civil Rules sponsored a symposium on civil litigation, which brought together federal and state judges, law professors, and plaintiff and defense lawyers, drawn from business, government, and public interest organizations. The symposium, which generated 40 papers and 25 data compilations, confirmed that, while the federal courts are fundamentally sound, in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts. The symposium specifically identified the need for procedural reforms that

would: (1) encourage greater cooperation among counsel; (2) focus discovery—the process of obtaining information within the control of the opposing party—on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information.

The Advisory Committee on Civil Rules set to work on those problems. Over the next three years, the Committee drafted proposed amendments and published them for public comment. It received more than 2,300 written comments and held public hearings in Dallas, Phoenix, and Washington, D.C., eliciting input from more than 120 witnesses. The Committee then revised the amendments in response to the public recommendations. The proposed amendments received further scrutiny from the Standing Committee, the Judicial Conference, and the Supreme Court, before submission to Congress. The amended rules, which can be viewed at <http://www.uscourts.gov/federal-rules-civil-procedure>, went into effect one month ago, on December 1, 2015. They mark significant change, for both lawyers and judges, in the future conduct of civil trials.

The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report. For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded

by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality:

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.

The amended rules accordingly emphasize the crucial role of federal judges in engaging in early and effective case management. The prior rules—specifically Rule 16—already required that the judge meet with the lawyers after the complaint is filed, confer about the needs of the case, and develop a case management plan. The amended rules have shortened the deadline for that meeting and express a preference for a face-to-face encounter to enhance communication between the judge and lawyers. The amendments also identify techniques to expedite resolution of pretrial discovery disputes, including conferences with the judge before filing formal motions in aid of discovery. Such conferences can often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply.

Recognizing the evolving role of information technology in virtually every detail of life, the amended rules specifically address the issue of “electronically stored information,” which has given birth to a new acronym—“ESI.” Rules 16 and 26(f) now require the parties to reach agreement on the preservation and discovery of ESI in their case management plan and discovery conferences. Amendments to Rule 37(e) effect a further refinement by specifying the consequences if a party fails to observe the generally recognized obligation to preserve ESI in the face of foreseeable litigation. If the failure to take reasonable precautions results in a loss of discoverable ESI, the courts must first focus on whether the information can be restored or replaced through alternative discovery efforts. If not, the courts may order additional measures “no greater than necessary” to cure the resulting prejudice. And if the loss of ESI is the result of one party’s intent to deprive the other of the information’s use in litigation, the court may impose prescribed sanctions, ranging from an adverse jury instruction to dismissal of the action or entry of a default judgment.

The rules amendments eliminate Rule 84, which referenced an appendix containing a number of civil litigation forms that were originally designed to provide lawyers and unrepresented litigants with examples of proper pleading. Over the years since their publication, many of those forms

have become antiquated or obsolete. The Administrative Office of the United States Courts assembled a group of experienced judges to replace those outdated forms with modern versions that reflect current practice and procedure. They have largely completed their work. The Administrative Office has already posted 12 revised forms on the federal judiciary's website, with three more to follow in the next month. See <http://www.uscourts.gov/forms/pro-se-forms>.

The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—"the just, speedy, and inexpensive determination of every action and proceeding"—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.

I think we are off to a good start. The Federal Judicial Center, which is the educational and research arm of the federal judiciary, has created a training program for federal judges to ensure they are prepared to introduce the procedural reforms in their courtrooms. Training is necessary for lawyers too, and the American Bar Association and many local bar organizations have initiated educational programs and workshops across the country. The practical implementation of the rules may require some adaptation and innovation. I encourage all to support the judiciary's plans to

test the workability of new case management and discovery practices through carefully conceived pilot programs. In addition, a wide variety of judicial, legal, and academic organizations have supplied key insights in the improvement of both federal and state rules of practice, and they are continuing to provide their perspectives and expertise on the rollout of the new rules. I am confident that the Advisory Committee on Civil Rules will continue to engage the full spectrum of those organizations in its ongoing work.

The success of the 2015 civil rules amendments will require more than organized educational efforts. It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share.

Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation. Faced with crushing dockets, judges can be tempted to postpone engagement in pretrial activities. Experience has shown, however, that judges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine

the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.

As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs’ and defendants’ counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.

I am hardly the first to urge that we must engineer a change in our legal culture that places a premium on the public’s interest in speedy, fair, and efficient justice. But I am motivated to address the subject now because the 2015 civil rules amendments provide a concrete opportunity for actually getting something done.

In the nineteenth century, a change in culture left dueling by the wayside and left us with lessons learned. Joseph Conrad’s novella “*The Duel*” tells the tale, taken from fact, of two gallant French cavalry

officers, D'Hubert and Feraud. Estranged by a trifling slight, they repeatedly duel over a 15-year period. According to newspapers of the era, the real-life antagonists, Dupont and Fournier, would cross swords and draw blood whenever their military service brought them near to one another. Conrad's characters, like the real ones, relentlessly persist in their personal feud through the rise, fall, reemergence, and ultimate exile of Napoleon, as the world transforms around them. In the end, these soldiers, who should have been comrades in a patriotic cause, spent much of their adult lives focused on a petty squabble that left them with nothing but scars. We should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result.

Another year has quickly passed, and once again, I am privileged and honored to be in a position to thank all of the judges, court staff, and judicial personnel throughout the Nation for their continued excellence and dedication.

Best wishes to all in the New Year.

## Appendix

### Workload of the Courts

In the 12-month period ending September 30, 2015, caseloads decreased in the Supreme Court, the regional appellate courts, the district courts, the bankruptcy courts, and the pretrial services system. Growth occurred, however, in the number of persons under post-conviction supervision.

#### *The Supreme Court of the United States*

The total number of cases filed in the Supreme Court decreased by 4.65 percent from 7,376 filings in the 2013 Term to 7,033 filings in the 2014 Term. The number of cases filed in the Court's *in forma pauperis* docket decreased by 5.50 percent from 5,808 filings in the 2013 Term to 5,488 filings in the 2014 Term. The number of cases filed in the Court's paid docket decreased by 1.47 percent from 1,568 filings in the 2013 Term to 1,545 filings in the 2014 Term. During the 2014 Term, 75 cases were argued and 75 were disposed of in 66 signed opinions, compared with 79 cases argued and 77 disposed of in 67 signed opinions during the 2013 Term. The Court also issued eight per curiam decisions during the 2014 Term in cases that were not argued.

### *The Federal Courts of Appeals*

In the regional courts of appeals, filings dropped four percent to 52,698. Appeals involving pro se litigants, which amounted to 51 percent of filings, fell four percent. Total civil appeals decreased seven percent. Criminal appeals rose three percent, as did appeals of administrative agency decisions, and bankruptcy appeals grew seven percent.

### *The Federal District Courts*

Civil case filings in the U.S. district courts declined six percent to 279,036. Cases involving diversity of citizenship (i.e., disputes between citizens of different states) fell 14 percent, largely because of a reduction in personal injury/product liability filings. Cases with the United States as defendant dropped seven percent in response to fewer filings of prisoner petitions and Social Security cases. Cases with the United States as plaintiff went down 10 percent as filings of forfeiture and penalty cases and contract cases decreased.

Filings for criminal defendants (including those transferred from other districts) held relatively steady, declining one percent to 80,069. Defendants accused of immigration violations dropped five percent, with the southwestern border districts receiving 79 percent of national immigration defendant filings. Defendants charged with property offenses (including

fraud) fell six percent. Other reductions were reported for filings involving traffic offenses, general offenses, regulatory offenses, and justice system offenses. Drug crime defendants, who accounted for 32 percent of total filings, rose two percent. Increases also occurred in filings related to firearms and explosives, sex offenses, and violent crimes.

### *The Bankruptcy Courts*

Bankruptcy petition filings decreased 11 percent to 860,182. Fewer petitions were filed in all bankruptcy courts but one—the Middle District of Alabama had three percent more filings this year. Consumer (i.e., nonbusiness) petitions dropped 11 percent, and business petitions fell 12 percent. Filings of petitions declined 14 percent under Chapter 7, eight percent under Chapter 11, and three percent under Chapter 13.

This year's total for bankruptcy petitions is the lowest since 2007, the first full year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. From 2007 to 2010, bankruptcy filings rose steadily, but they have fallen in each of the last five years.

### *The Federal Probation and Pretrial Services System*

A total of 135,468 persons were under post-conviction supervision on September 30, 2015, an increase of two percent over the total one year earlier. Of that number, 114,961 persons were serving terms of supervised

release after leaving correctional institutions, a three percent increase from the prior year.

Cases activated in the pretrial services system, including pretrial diversion cases, fell five percent to 95,013.

## Legal Alert

### E-Discovery Update: Jury Still Out on Whether New Federal Rules Will Significantly Impact Discovery

February 1, 2016

As noted in our [December e-discovery update](#), the much-discussed amendments to the Federal Rules of Civil Procedure became effective December 1, 2015. One of the most notable amendments was the limitation on the scope of discovery to only information “relevant to any party’s claim or defense and proportional to the needs of the case,” and the deletion of the “reasonably calculated to lead to the discovery of admissible evidence” language. Fed. R. Civ. P. 26(b)(1). The question remains as to whether this new language will lead to a more restrictive scope of discovery.

On the positive side, one court recently observed that “[a] change in the legal culture that embraces the leave no stone unturned and scorched earth approach to discovery is long overdue.” *Roberts v. Clark County School District*, No. 2:15-cv-00388, 2016 WL 123320, \*7 (D. Nev. Jan. 11, 2016). The court cited Chief Justice Roberts’ Year-End Report, which discussed the changes to the federal rules and “beseeched judges and lawyers to ‘engineer a change in our legal culture that places a premium on the public’s interest in speedy, fair and efficient justice.’” The court denied portions of a motion to compel in a gender discrimination case, thereby “[h]eeding the call to actively manage and engineer a change in this legal culture.” For example, the court denied the defendant’s request for the plaintiff’s administrative, educational and tax records as being “grossly out of proportion to what [the defendant] legitimately needs to know to defend itself” against the discrimination claims. The court also nevertheless found some of the requests “relevant to any party’s claim or defense and proportional to the needs of the case.”

Similarly, a Northern District of California court recently denied a motion to compel filed by Merck, stating that “[t]he present dispute offers a good example of the wisdom of the Advisory Committee on Civil Rules in elevating proportionality in defining the scope of permissible discovery.” *Gilead Sciences, Inc. v. Merck & Co., Inc.*, No. 5:13-cv-04057, 2016 WL 146574, \*1 (N.D. Cal. Jan. 13, 2016). In this patent infringement suit, Merck sought further discovery related to compounds in tubes that Merck believed may have been similar to compounds described in Merck’s patent. Gilead maintained that the compounds contained in the tubes were not the same compounds as those described in the patent and thus further discovery on the compounds was inappropriate. The court agreed with Gilead, stating that “[w]ithout more specific information triggering some reason for doubt, the Court must take the producing party ... at its word,” and requiring Gilead to produce discovery on other compounds would “be like requiring GM to produce discovery on Buicks and Chevys in a patent case about Cadillacs simply because all three happen to be cars.”

Conversely, some courts seem to be clinging to the old “reasonably calculated to lead to the discovery of admissible evidence standard” when applying the 2015 rule amendments. See, e.g., *Lightsquared Inc. v. Deere & Co.*, No. 13 Civ. 8157, 2015 WL 8675377, \*2 (S.D.N.Y. Dec. 10, 2015). In *Lightsquared*, the court cited the new language in Rule 26, but then stated that “relevance is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense.” See also *Bagley v. Yale University*, No. 3:13-cv-01890, 2015 WL 8750901, \*7 (D. Conn. Dec. 14, 2015). Here, the court noted the new Rule 26 language, but then cited case law for the proposition that relevance should still be construed broadly and should “encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any party’s claim or defense”. Similarly, another court cited to the new language of Rule 26, and then cited case law to define relevancy as encompassing “any possibility that the information sought may be relevant to the claim or defense of any party.” *PCS Phosphate Co., Inc. v. Am. Home Assurance Co.*, No. 5:14-CV-99, 2015 WL 8490976, \*2 (E.D.N.C. Dec. 10, 2015).

One hopes that, as time passes, the amendments will be “a major stride towards a better federal court system,” as Justice Roberts predicted. John Roberts, [2015 Year-End Report on the Federal Judiciary](#). But, with courts still referencing language that discovery shall be “construed broadly” and shall encompass any matter that “reasonably could lead to another matter” that “could bear on” any party’s claim or defense, change may be slow in coming.

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## Resource Attorneys

[Chelli D. Robinson](#)

T: +1 704 343 2256

[mrobinson@mcguirewoods.com](mailto:mrobinson@mcguirewoods.com)

[Jill Crawley Griset](#)

T: +1 704 343 2193

[jgriset@mcguirewoods.com](mailto:jgriset@mcguirewoods.com)

[Anne Bentley McCray](#)

T: +1 804 775 1037

[amccray@mcguirewoods.com](mailto:amccray@mcguirewoods.com)

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